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9  
10 **UNITED STATES DISTRICT COURT**  
11 **CENTRAL DISTRICT OF CALIFORNIA**

12 SHOSH YONAY and YUVAL YONAY,  
13 Plaintiffs,

14 v.

15 PARAMOUNT PICTURES  
16 CORPORATION, a Delaware corporation,  
and DOES 1-10,

17 Defendants.  
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Case No. 2:22-CV-3846-PA

**PARAMOUNT PICTURES  
CORPORATION'S  
OPPOSITION TO PLAINTIFFS'  
MOTION TO STRIKE**

[Declaration of Molly Lens,  
Declaration of Matthew Kaiser, and  
[Proposed] Order filed concurrently  
herewith]

**Hearing Date:** January 8, 2024

**Hearing Time:** 1:30 PM

**Place:** Courtroom 9A

**Judge:** Hon. Percy Anderson

## TABLE OF CONTENTS

		<b>Page</b>
1		
2		
3	I. INTRODUCTION.....	1
4	II. BACKGROUND.....	1
5	A. The Parties’ Document Productions. ....	1
6	B. The Parties’ September Meet-and-Confer Discussions.....	2
7	C. Plaintiffs’ Motion for Summary Judgment.....	3
8	D. PPC’s Inadvertently-Delayed Production of the Preview Cut.....	4
9	III. ARGUMENT .....	5
10	A. The Court Should Not Consider Plaintiffs’ Motion Because It Is	
11	Procedurally Improper. ....	5
12	B. PPC’s Delayed Production of the Preview Cut Was Both	
13	Substantially Justified and Harmless. ....	7
14	C. The Preview Cut Is Admissible, and Plaintiffs’ Argument to the	
15	Contrary Does Not Provide a Basis for Striking It Regardless. ....	16
16	D. The Relief Plaintiffs Seek Is Overbroad. ....	19
17	IV. CONCLUSION .....	20
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

## TABLE OF AUTHORITIES

Page(s)

**Cases**

<i>Archie v. Pop Warner Little Scholars, Inc.</i> , 2019 WL 13020480 (C.D. Cal. Oct. 10, 2019) .....	16
<i>Arroyo v. Cervantes</i> , 2019 WL 8755115 (C.D. Cal. Aug. 16, 2019) .....	6
<i>Ayer v. Frontier Commc'ns Corp.</i> , 2017 WL 8116437 (C.D. Cal. July 6, 2017) .....	7
<i>Chinitz v. Intero Real Est. Servs.</i> , 2021 WL 1375837 (N.D. Cal. Apr. 12, 2021) .....	18
<i>Desire, LLC v. Manna Textiles, Inc.</i> , 2017 WL 5635009 (C.D. Cal. Aug. 18, 2017) .....	17, 18
<i>Estate of Najera-Aguirre v. County of Riverside</i> , 2018 WL 10152556 (C.D. Cal. Dec. 7, 2018) .....	6
<i>Fraser v. Goodale</i> , 342 F.3d 1032 (9th Cir. 2003) .....	18
<i>Fusion IV Pharms., Inc. v. California</i> , 2018 WL 6118586 (C.D. Cal. Aug. 22, 2018) .....	7
<i>Futamura ex rel. Est. of Futamura v. Unum Life Ins. Co. of Am.</i> , 305 F. Supp. 2d 1181 (W.D. Wash. 2004) .....	12
<i>Garcia v. Gateway Hotel L.P.</i> , 2021 WL 3556826 (C.D. Cal. Apr. 6, 2021) .....	7
<i>Hal Roach Studios, Inc. v. Richard Feiner &amp; Co.</i> , 896 F.2d 1542 (9th Cir. 1989) .....	18
<i>Hodges v. Hertz Corp.</i> , 351 F. Supp. 3d 1227 (N.D. Cal. 2018) .....	18
<i>In re Kaypro</i> , 218 F.3d 1070 (9th Cir. 2000) .....	17, 18
<i>In re Korean Ramen Antitrust Litig.</i> , 281 F. Supp. 3d 892 (N.D. Cal. 2017) .....	17, 18

# TABLE OF AUTHORITIES

(continued)

	Page(s)
<i>McGhee v. N. Am. Bancard, LLC</i> , 2021 WL 5764708 (S.D. Cal. June 28, 2021).....	11
<i>Merchant v. Corizon Health, Inc.</i> , 993 F.3d 733 (9th Cir. 2021).....	8
<i>Nat.-Immunogenics Corp. v. Newport Trial Grp.</i> , 2017 WL 10573941 (C.D. Cal. Nov. 16, 2017).....	12
<i>Pogrebnoy v. Russian Newspaper Distribution, Inc.</i> , 742 F. App'x 291 (9th Cir. 2018).....	6
<i>Rago v. Select Comfort Retail Corp.</i> , 2021 WL 3621890 (C.D. Cal. June 11, 2021).....	13
<i>Reg'l Serv. Corp. v. Greenpoint Mortg. Funding, Inc.</i> , 2009 WL 10700231 (C.D. Cal. Apr. 6, 2009).....	7
<i>RES Exhibit Servs., LLC v. LNW Gaming, Inc.</i> , 2023 WL 6296050 (D. Nev. Sept. 27, 2023) .....	13
<i>Silver State Intell. Techs., Inc. v. Garmin Int'l, Inc.</i> , 32 F. Supp. 3d 1155 (D. Nev. 2014) .....	17, 18
<i>Tolan v. Cotton</i> , 572 U.S. 650 (2014) .....	15
<i>Tri-Valley CARES v. U.S. Dep't of Energy</i> , 671 F.3d 1113 (9th Cir. 2012).....	6
<i>UMG Recordings, Inc. v. Am. Home Assurance Co.</i> , 2006 WL 8451158 (C.D. Cal. Feb. 27, 2006).....	16
<i>United States v. Workinger</i> , 90 F.3d 1409 (9th Cir. 1996).....	17
<i>Voyager Indemnity Ins. Co. v. Zalman N., Inc.</i> , 2023 WL 2904591 (C.D. Cal. Apr. 7, 2023).....	13
<i>Zucchella v. Olympusat, Inc.</i> , 2021 WL 4706541 (C.D. Cal. Mar. 30, 2021) .....	6

**TABLE OF AUTHORITIES**  
(continued)

**Page(s)**

**Rules**

C.D. Cal. L.R. 7-3 .....	5
C.D. Cal. L.R. 37-1 .....	5, 6
Fed. R. Civ. P. 37 .....	7
Fed. R. Evid. 602 .....	18
Fed. R. Evid. 901 .....	16, 17

## 1 **I. INTRODUCTION**

2 Plaintiffs seek discovery sanctions against PPC for its inadvertently-delayed  
 3 production of a single document that PPC used in its opposition to a narrow (and  
 4 moot) portion of their summary judgment motion about which they never  
 5 conferred. Notwithstanding their claim of surprise, Plaintiffs have long known  
 6 about the December 11, 2019 preview of *Maverick*, which was disclosed in  
 7 documents produced during discovery, including one Plaintiffs introduced as  
 8 evidence to support their own motion for summary judgment. But Plaintiffs never  
 9 asked PPC for a copy of the preview itself (the “Preview Cut”)—let alone  
 10 “repeated[ly]” so, Mot. at 1—and PPC did not independently realize it had not been  
 11 produced, as the document was housed on a separate platform from all other  
 12 discovery materials with heightened security protocols to protect its confidentiality.  
 13 PPC promptly produced the Preview Cut upon realizing its mistake. To be clear,  
 14 PPC regrets that the Preview Cut was not timely produced, but this inadvertent and  
 15 non-prejudicial delay does not provide a basis for striking the document from the  
 16 summary judgment record.

## 17 **II. BACKGROUND**

### 18 **A. The Parties’ Document Productions.**

19 Plaintiffs and PPC each propounded requests for production of documents in  
 20 early January 2023. Declaration of Molly Lens (“Lens Decl.”) ¶ 3. PPC made its  
 21 first document production promptly thereafter, on January 20, 2023, which was  
 22 followed in March 2023 by meet-and-confer discussions that resolved the handful  
 23 of disputes Plaintiffs raised about that initial production. *Id.* ¶¶ 4-5. PPC made its  
 24 second document production in April 2023, and rolling supplemental productions  
 25 throughout the discovery period. *Id.* ¶¶ 6-7. In all, PPC produced over 12,000  
 26 documents, comprising nearly 170,000 pages. *Id.* ¶ 8.

27 Plaintiffs, by contrast, repeatedly refused to cooperate in discovery. As of  
 28 July 2023, Plaintiffs still had not produced a single document, despite five months

1 of conferral letters and outreach in vain by PPC (to which Plaintiffs often refused to  
 2 respond at all). *Id.* ¶ 9. Left with no other option, PPC moved to compel on July  
 3 24. *Id.* ¶ 10; Dkt. 40. Plaintiffs did not oppose the motion, and the Court ordered  
 4 them to produce documents and complete that production no later than August 21,  
 5 2023. Lens Decl. ¶¶ 11-12; Dkts. 44, 46. On the August 21 deadline, Plaintiffs  
 6 finally made their first production of documents, though it was deficient in form  
 7 and substance. Lens Decl. ¶ 13. Among other issues, their documents were  
 8 produced as one agglomerated file—though not received that way by Plaintiffs’  
 9 counsel—and without text searchability, custodial information, or, in several cases,  
 10 legible scanning. *Id.*

11 Although the Court’s order mandated that Plaintiffs *complete* their document  
 12 production by August 21, Dkt. 46, Plaintiffs made a further untimely production  
 13 over a month later on September 25. Lens Decl. ¶ 14. And a month after that, on  
 14 October 30—that is, not only after their Court-ordered production deadline, but also  
 15 well after the October 6, 2023 close of liability discovery—Plaintiffs made yet  
 16 another untimely production with a video that they would use in their summary  
 17 judgment motion just one week later. *Id.* ¶ 15. Then, with their summary judgment  
 18 motion, Plaintiffs still introduced 10 altogether-unproduced documents, and another  
 19 unproduced document on reply. *Id.* ¶¶ 16, 18.

## 20 **B. The Parties’ September Meet-and-Confer Discussions.**

21 On September 14, 2023, after six months of silence about PPC’s document  
 22 productions, Plaintiffs sent PPC a letter to raise purported issues therewith. *Id.* ¶ 20  
 23 & Ex. 1. One of the subjects Plaintiffs raised was their desire for “original,  
 24 unedited interviews” documenting the development of the 1986 *Top Gun* film and  
 25 *Maverick*. *Id.* ¶ 21 & Ex. 1 at 2. Plaintiffs did not raise the topic of the December  
 26 11, 2019 preview of *Maverick*, or any prior or subsequent previews. *Id.* PPC sent  
 27 Plaintiffs a responsive letter on September 21, addressing the topics that Plaintiffs  
 28 covered in their letter. *Id.* ¶ 22 & Ex. 2. On the subject of interviews, PPC

1 explained that Plaintiffs’ request was outside the scope of the parties’ specific  
 2 agreement as to what PPC would produce in response to the relevant Request for  
 3 Production. *Id.* ¶ 22 & Ex. 2 at 5. The parties then spoke on September 22, during  
 4 which the parties again discussed audio and video interviews but Plaintiffs did not  
 5 request any of the production footage from the making of the movie, much less any  
 6 of the previews. *Id.* ¶ 23.<sup>1</sup>

### 7 **C. Plaintiffs’ Motion for Summary Judgment.**

8 On October 12, 2023, Plaintiffs sent PPC a meet-and-confer letter pursuant to  
 9 Local Rule 7-3 advising that they intended to file a motion for summary judgment.  
 10 Declaration of Matthew Kaiser (“Kaiser Decl.”) ¶ 3. The letter stated two grounds  
 11 for Plaintiffs’ summary judgment motion: (1) “As to their claims for declaratory  
 12 relief and copyright infringement, Plaintiffs are entitled to judgment as a matter of  
 13 law because Paramount’s infringing film, *Top Gun: Maverick* (‘*Maverick*’), is  
 14 substantially similar to Ehud Yonay’s (‘Yonay’) story, *Top Guns* (‘Story’); and (2)  
 15 “as to their breach of contract claim[,] [t]he language and intent of the contract  
 16 required Paramount to accord credit to Yonay on *Maverick* for the film’s use of the  
 17 Story’s plot, themes, and characterizations.” *Id.* ¶ 3 & Ex. 1. The next day, the  
 18 parties conducted a conference of counsel about Plaintiffs’ summary judgment  
 19 motion (and other contemplated motions). *Id.* ¶ 4. Plaintiffs’ counsel again stated  
 20 that their motion would be based on the purported substantial similarity between the  
 21 works and again did not mention PPC’s Derivative Works Exception defense. *Id.*  
 22 Plaintiffs filed their summary judgment motion on November 6, 2023, seeking  
 23 summary judgment not only as to the issue of substantial similarity but also as to  
 24 PPC’s Derivative Works Exception defense. *See* Dkt. 62.

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25 <sup>1</sup> The parties also met and conferred about unrelated issues on September 22. Lens Decl.  
 26 ¶ 24. In response to one of these separate issues, PPC produced a few additional  
 27 documents. *Id.* PPC also produced a handful of additional publicly-available documents  
 28 that it intended to rely upon—including the video from the U.S. Navy referenced in Mr.  
 Toberoff’s declaration. *Id.* This video was completely unrelated to the parties’ meet-and-  
 confer discussion. *Id.*



**D. PPC's Inadvertently-Delayed Production of the Preview Cut**

Because of this meet-and-confer failure, PPC had to work quickly to develop its opposition to Plaintiffs' argument on the Derivative Works Exception. Lens Decl. ¶ 25. As part of that argument, PPC's counsel went to cite the December 11, 2019 Preview Cut, which had been shown before Plaintiffs' copyright termination took effect on January 24, 2020. *Id.* ¶ 26. But in looking for a produced copy of the Preview Cut to cite, PPC's counsel realized that the Preview Cut inadvertently had not been produced. *Id.* ¶ 27. Because the Preview Cut is relevant *only* to the Derivative Works Exception, PPC did not realize its error when preparing its contemplated summary judgment arguments on the matters the parties discussed in their pre-motion conference. *Id.* ¶ 28.

At no point did Plaintiffs request the Preview Cut, although they knew about the December 11, 2019 preview of *Maverick* through various documents PPC timely produced—one of which Plaintiffs used to support their own summary judgment motion. *Id.* ¶¶ 29-30 & Exs. 4 & 5; Ex. 33 to Declaration of Marc Toberoff in Support of Summary Judgment ("Toberoff MSJ Decl."), Dkt. 62-35, at TGM0010086. Plaintiffs' counsel also questioned witness Joseph Kosinski at his deposition about the *third* preview of *Maverick* (for which the same type of documents had been produced, though again not the preview itself<sup>2</sup>), but declined to ask about the *second* preview (or most other pre-termination work performed on *Maverick*). Lens Decl. ¶ 31 & Exs. 3 & 6.

The security precautions attendant to the Preview Cut, which was filed under seal, contributed to PPC's mistake in not producing the document sooner. *Id.* ¶ 33. In the ordinary course, PPC's counsel maintains its discovery materials, including documents collected from clients, on an electronic platform called Relativity. *Id.* ¶

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<sup>2</sup> The third preview was not responsive to Plaintiffs' discovery requests; because it was shown *post*-termination, it does not bear on PPC's Derivative Works Exception defense or the other issues in this case.

34. This platform hosts emails, scans of hard-copy documents, and audiovisual materials alike. *Id.* However, due to the intensive confidentiality precautions for the Preview Cut, PPC made the Preview Cut available to its counsel only through a separate platform containing a series of additional security measures. *Id.* ¶ 35. Therefore, it did not show up as an unproduced document on Relativity, encumbering counsel's usual cross-checks. *Id.*

Once PPC realized its error, it promptly sought to rectify the issue and had physical copies of the Preview Cut burned and produced to Plaintiffs' counsel. *Id.* ¶¶ 36-37. It completed this supplemental production on November 20. *Id.* ¶ 37.

On December 3, 2023, Plaintiffs filed the instant motion to strike, without first meeting and conferring with PPC about it. *Id.* ¶ 39.

### III. ARGUMENT

#### A. The Court Should Not Consider Plaintiffs' Motion Because It Is Procedurally Improper.

At the outset, Plaintiffs' motion is procedurally improper and should be denied on that basis alone. The Central District's Local Rules require counsel to meet and confer before the filing of any motion, which Plaintiffs failed to do here. While Plaintiffs sent PPC a letter threatening to move to exclude the Preview Cut, Ex. B to Declaration of Marc Toberoff in Support of Motion to Strike ("Toberoff MTS Decl."), Dkt. 82-3, Plaintiffs never initiated any actual meet-and-confer discussions about the matter. PPC heard nothing further until Plaintiffs filed their motion, in violation of the Local Rules.

Local Rule 37-1 provides that, "[b]efore filing any motion relating to discovery under F.Rs.Civ.P. 26-37, counsel for the parties must confer in a good-faith effort to eliminate the necessity for hearing the motion or to eliminate as many of the disputes as possible."<sup>3</sup> C.D. Cal. L.R. 37-1. "It is the responsibility of

<sup>3</sup> Because Plaintiffs moved pursuant to Rule 37, their motion is governed by Local Rule 37-1. Regardless, Rule 7-3 imposes a parallel meet-and-confer requirement for motions that do not concern discovery matters.

counsel for the moving party to arrange for this conference,” which the moving party must request through a letter “identify[ing] each issue and/or discovery request in dispute, stat[ing] briefly as to each such issue/request the moving party’s position (and provide any legal authority the moving party believes is dispositive of the dispute as to that issue/request), and specify[ing] the terms of the discovery order to be sought.” *Id.* Counsel located in the same county (including counsel here, whose respective offices are both situated in Los Angeles County) must confer “in person at the office of the moving party’s counsel unless the parties agree to meet someplace else.” *Id.* If counsel are located in different counties, “the conference may take place telephonically.” *Id.*

Plaintiffs’ letter neither requested such a conference nor satisfied the meet-and-confer requirement on its own. *See* Ex. B to Toberoff MTS Decl. Even a proper pre-filing letter—which Plaintiffs’ was not—“merely initiates the meet and confer process and does not itself satisfy the requirements of Local Rule 37-1.” *Estate of Najera-Aguirre v. County of Riverside*, 2018 WL 10152556, at \*3 (C.D. Cal. Dec. 7, 2018) (denying motion for failure to comply with Rule 37-1 meet-and-confer requirement); *Zucchella v. Olympusat, Inc.*, 2021 WL 4706541, at \*2-3 (C.D. Cal. Mar. 30, 2021) (holding that pre-motion letter “did *not* meet the pre-filing requirements of Local Rule 37-1” where it failed to solicit a conference of counsel and denying motion on that basis); *Arroyo v. Cervantes*, 2019 WL 8755115, at \*1 (C.D. Cal. Aug. 16, 2019) (finding deficient pre-motion letter that failed to request conference, noting that “[a] letter is not a meet and confer conference in compliance with Local Rule 37-1,” and striking motion on that basis). It is “well within a district court’s discretion” to deny a motion “as the result of a failure to comply with local rules.” *Tri-Valley CARES v. U.S. Dep’t of Energy*, 671 F.3d 1113, 1131 (9th Cir. 2012). And this Court has repeatedly done so—including for failure to properly meet and confer. *E.g.*, *Pogrebnoy v. Russian Newspaper Distribution, Inc.*, 742 F. App’x 291, 292 (9th Cir. 2018) (affirming order striking

1 motion for failure to comply with Local Rules’ meet-and-confer requirement); *Ayer*  
 2 *v. Frontier Commc’ns Corp.*, 2017 WL 8116437, at \*3 (C.D. Cal. July 6, 2017)  
 3 (Anderson, J.) (striking motion for failure to satisfy meet-and-confer requirement);  
 4 *Reg’l Serv. Corp. v. Greenpoint Mortg. Funding, Inc.*, 2009 WL 10700231, at \*1  
 5 (C.D. Cal. Apr. 6, 2009) (Anderson, J.) (denying motion for failure to satisfy meet-  
 6 and-confer requirement); *Garcia v. Gateway Hotel L.P.*, 2021 WL 3556826, at \*1  
 7 n.1 (C.D. Cal. Apr. 6, 2021) (Anderson, J.) (“Defendant’s failure to comply with  
 8 Local Rule 7-3 provides an additional basis for the Court to deny Defendant’s  
 9 Motion.”); *Fusion IV Pharms., Inc. v. California*, 2018 WL 6118586, at \*2 (C.D.  
 10 Cal. Aug. 22, 2018) (Anderson, J.) (“Plaintiffs’ failure to comply with Local Rule  
 11 7-3 is sufficient reason to deny Plaintiffs’ motion.”). It should follow suit here.

12 Plaintiffs’ failure to meet and confer on this motion dovetails with their  
 13 broader failure to meet and confer about their intent to move for summary judgment  
 14 on the Derivative Works Exception—which is the only facet of the case to which  
 15 the Preview Cut is relevant. Plaintiffs advised by letter that they intended to move  
 16 for summary judgment on substantial similarity between the Article and *Maverick*,  
 17 but excluded from their letter any mention of the Derivative Works Exception.  
 18 Kaiser Decl. ¶ 3 & Ex. 1. At the parties’ summary judgment meet-and-confer  
 19 session, Plaintiffs’ counsel reiterated that they intended to move for summary  
 20 judgment on substantial similarity and again omitted any reference to the Derivative  
 21 Works Exception. *Id.* ¶ 4. PPC did not learn otherwise until Plaintiffs’ motion was  
 22 filed. Given this double meet-and-confer failure, the Court should reject Plaintiffs’  
 23 motion on procedural grounds alone.

24 **B. PPC’s Delayed Production of the Preview Cut Was Both**  
 25 **Substantially Justified and Harmless.**

26 Federal Rule of Civil Procedure 37 authorizes a court to prevent a party from  
 27 introducing evidence that it failed to produce *only* where such failure was neither  
 28 “substantially justified” nor “harmless.” Fed. R. Civ. P. 37(c)(1). Although this

1 sanction has been described as “automatic,” “[t]he automatic nature of the rule’s  
 2 application does not mean that a district court *must* exclude evidence that runs afoul  
 3 of Rule 26(a) or (e)” but rather “that a district court *may* properly impose an  
 4 exclusion sanction where a noncompliant party has failed to show that the  
 5 discovery violation was either substantially justified or harmless.” *Merchant v.*  
 6 *Corizon Health, Inc.*, 993 F.3d 733, 740 (9th Cir. 2021). Regardless, both  
 7 exceptions are satisfied here.

8 *1. PPC’s Delayed Production of the Preview Cut Was Substantially*  
 9 *Justified.*

10 PPC’s delayed production of the Preview Cut was substantially justified,  
 11 although PPC regrets that it was inadvertently not produced earlier in the case.  
 12 While Plaintiffs incorrectly suggest that the Preview Cut should have been  
 13 produced in response to several of their discovery requests, PPC agrees that the  
 14 Preview Cut was responsive to one of Plaintiffs’ Requests for Production, Request  
 15 No. 52, in response to which PPC agreed to produce documents on which PPC  
 16 intended to rely to support its defense of the Derivative Works Exception.<sup>4</sup>  
 17 However, the delay in its production was attributable to inadvertence, not malintent.

18 In the ordinary course, PPC’s counsel maintains its discovery materials,  
 19 including documents collected from clients, on an electronic platform called  
 20 Relativity. Lens Decl. ¶ 34. This platform hosts emails, scans of hard-copy  
 21 documents, and audiovisual materials alike. *Id.* However, due to the intensive  
 22 confidentiality precautions accompanying the Preview Cut (which has been lodged  
 23 under seal), PPC made the Preview Cut available to its counsel only through a  
 24 *separate* platform containing a series of additional security measures. *Id.* ¶ 35.  
 25 Therefore, it did not show up as an unproduced document on Relativity,

26 <sup>4</sup> Plaintiffs now claim that PPC also should have produced the previous and subsequent  
 27 preview cuts, Mot. at 7, but those previews do not bear on PPC’s Derivative Works  
 28 Exception defense; the relevance of the December 11, 2019 preview is that it was the last  
 preview shown before Plaintiffs’ termination took effect on January 24, 2020.

1 encumbering counsel's usual cross-checks. *Id.* Only when PPC's counsel tried to  
 2 locate a produced copy of the Preview Cut to cite it in opposition to Plaintiffs'  
 3 summary judgment motion—a process that was itself delayed by Plaintiffs' failure  
 4 to meet and confer about their intent to move on the Derivative Works Exception—  
 5 did PPC's counsel realize the Preview Cut had not been produced. *Id.* ¶¶ 25-27.  
 6 And it promptly sought to rectify the issue, having physical copies of the Preview  
 7 Cut burned by PPC and produced to Plaintiffs' counsel.<sup>5</sup> *Id.* ¶¶ 36-37. Plaintiffs  
 8 contend that PPC did not remedy the issue quickly enough after discovering the  
 9 production issue, because the Preview Cut copies were burned on Thursday,  
 10 November 16 and produced on Monday, November 20, *see* Mot. at 8, but that  
 11 turnaround was quite *fast* considering that the Preview Cut could be produced only  
 12 in physical form and needed to be transported from PPC to PPC's counsel to  
 13 Plaintiffs' counsel (and that two of the intervening days were weekend days).

14 Contrary to Plaintiffs' representations, at no point did they specifically  
 15 request a copy of the Preview Cut from PPC. Lens Decl. ¶ 29. (Plaintiffs did,  
 16 however, know about the December 11, 2019 preview, which was disclosed in  
 17 several other documents produced in discovery, including the post-production  
 18 schedule on which Plaintiffs themselves rely in their summary judgment briefing.<sup>6</sup>)  
 19

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20 <sup>5</sup> Plaintiffs further criticize PPC for not identifying PPC as the custodian of the Preview  
 21 Cut on the day of the production, Opp. at 8, but the Declaration of Ralph Bertelle resolved  
 22 any possible doubt that PPC was the custodian. Plaintiffs did not raise this purported  
 23 issue with PPC, and they do not and could not claim any prejudice from the two-day delay  
 24 in receiving confirmation that PPC was, in fact, the custodian. (And, for that matter,  
 Plaintiffs repeatedly failed to identify the custodian of *their* produced documents. Lens  
 Decl. ¶ 13.)

25 <sup>6</sup> *E.g.*, Ex. 33 to Toberoff MSJ Decl. at TGM0010086 (post-production schedule with  
 26 December 11, 2019 calendar entry reading: "PREVIEW #2 – PARAMUS, NJ"); Ex. 4 to  
 27 Lens Decl. (memorandum from PPC with "Preview 2 Notes," dated December 13, 2019,  
 28 thanking "Top Gun Team" for a "terrific preview" and providing comments based on  
 audience response); Ex. 5 to Lens Decl. (expanded report of takeaways from "Recruited  
 Audience Screening #2: December 11, 2019").



1 Had Plaintiffs asked for the Preview Cut, PPC would have recognized it had not  
2 been produced and produced it. But they never did.

3 Plaintiffs use misleading ellipses to insinuate they requested the Preview Cut  
4 in a September meet-and-confer letter, Opp. at 6, but the omitted context shows that  
5 the parties were *actually* debating the production of audio and video interviews that  
6 documented the development of *Maverick*. In reality, the parties' exchange  
7 proceeded as follows. After raising no issues with PPC's document productions for  
8 six months (and just weeks after inexplicably making their *first* document  
9 production, which was itself deficient), Plaintiffs sent PPC a letter on September 14  
10 claiming, *inter alia*:

11 Paramount has also failed to produce the *unedited* underlying  
12 recordings, audio and/or video, and (in most instances) transcriptions  
13 thereof referenced in emails and elsewhere as documenting the relevant  
14 development of the sequel *Top Gun: Maverick* and of *Top Gun*. For  
15 instance, Jerry Bruckheimer discusses the Story at length in the highly  
16 edited creator commentary accompanying the Blue-Ray re-release of  
17 the 1986 film—which Paramount did not produce; nor did it produce  
18 the underlying unedited material. As to *Top Gun: Maverick*, *excerpts*  
19 of interviews Paramount caused to be recorded in audio and/or video  
20 format were later incorporated into the Paramount's "production notes"  
21 as well as in home releases as "bonus material," e.g., creator  
22 commentary, yet Paramount failed to produce the original, unedited  
23 interviews as required.

24 Lens Decl. ¶ 20 & Ex. 1 at 2 (footnotes omitted). On September 21, PPC  
25 responded:

26 You claim that Paramount Pictures has failed to produce all "original,  
27 unedited interviews." Tellingly, however, you do not cite any of  
28 Plaintiffs' actual requests for production, much less Paramount  
Pictures' responses to such requests, in support. As a reminder, in  
response to Request No. 43, which requested interviews of talent  
involved in *Top Gun: Maverick*, Paramount Pictures agreed to produce  
"documents *sufficient to identify* press interviews arranged by  
Paramount Pictures related to *Maverick* given [] by the talent involved

therewith.” *See* Feb. 6, 2023 Paramount Pictures’ Responses and Objections to Plaintiffs’ First Set of RFPs at 46. You raised this response in your March 6 letter, the parties discussed this issue during the March 7 meet and confer, and Paramount Pictures promptly confirmed thereafter that it “subscribed to a service that aggregated domestic press coverage from the film and that Paramount Pictures would produce such reports, even though the identified stories, interviews, videos etc. are in the public record.” *See* Mar. 17, 2023 Email from M. Lens. And, as the produced documents cited in your letter make clear, Paramount Pictures has complied with its agreement and obligations.

*Id.* ¶ 22 & Ex. 2 at 5. The parties held a meet-and-confer discussion the following day. *Id.* ¶ 23. Consistent with Plaintiffs’ September 14 letter and PPC’s responsive September 21 letter, the parties’ September 22 discussion about footage was limited to interviews and Request for Production No. 43, in particular. *Id.* None of the previews of *Maverick* ever came up. *Id.* Plaintiffs’ characterization of this exchange is simply inaccurate.

At base, PPC’s delayed production of the Preview Cut was the result of inadvertence, coupled with the unusual security precautions attendant to the video. PPC has produced over 12,000 documents in this matter, comprising nearly 170,000 pages, and this *one* document housed on a different server due to out-of-the-ordinary security protocols (a document Plaintiffs knew about but did not directly request) fell through the cracks. Lens Decl. ¶¶ 8, 27-35. The Preview Cut did not come up earlier in the summary judgment sequence because it was not relevant to the issues presented by PPC’s motion or to the issues in Plaintiffs’ motion about which they met and conferred. Neither PPC nor its counsel has demonstrated any bad faith, and the delay was substantially justified. *See, e.g., McGhee v. N. Am. Bancard, LLC*, 2021 WL 5764708, at \*2 (S.D. Cal. June 28, 2021) (denying Rule 37 sanctions for late production of documents and reasoning that “defendant has explained it belatedly located documents that were not previously produced, [] the record before the Court demonstrates that once located,



1 the documents were promptly produced to plaintiff,” and therefore “defendant’s  
 2 [late] production of a small number of documents (relative to its overall production  
 3 of over 47,000 pages of documents) is not a basis for a finding of contempt, or for  
 4 the imposition of sanctions”); *Futamura ex rel. Est. of Futamura v. Unum Life Ins.*  
 5 *Co. of Am.*, 305 F. Supp. 2d 1181, 1192 (W.D. Wash. 2004) (denying motion to  
 6 strike undisclosed, late-produced document and concluding it was properly before  
 7 the court on summary judgment because the document “was inadvertently omitted  
 8 and provided as soon as [defendant] discovered that it had been omitted”).

9 Plaintiffs’ indignation at PPC’s inadvertently-delayed production of the  
 10 Preview Cut is all the more baffling given that they have repeatedly produced  
 11 documents after Court-ordered deadlines in this matter and relied on eleven  
 12 altogether-unproduced documents for their summary judgment motion. In  
 13 discovery, Plaintiffs failed to produce *any* documents for months on end, forcing  
 14 PPC to file a motion to compel. Lens Decl. ¶¶ 9-10. In response to that motion,  
 15 Plaintiffs stipulated to complete their productions by August 21, 2023, which the  
 16 Court so-ordered. *See* Dkts. 45 & 46. Plaintiffs finally made their first document  
 17 production on that date—though it was woefully deficient in format and substance  
 18 alike.<sup>7</sup> Lens Decl. ¶ 13. Then, more than a month after that Court-ordered deadline  
 19 passed, Plaintiffs produced more documents. *Id.* ¶ 14. And again, right before  
 20 filing their motion for summary judgment, Plaintiffs produced a video. *Id.* ¶ 15.  
 21 Then, with their motion for summary judgment, Plaintiffs *still* relied on 10 entirely  
 22 unproduced documents. *Id.* ¶ 16. And they relied on yet another in reply.<sup>8</sup> *Id.* ¶

23 <sup>7</sup> The Court’s August orders required Plaintiffs to produce all responsive documents  
 24 identified through a reasonably diligent search, thereby resolving one of the issues raised  
 25 in PPC’s motion to compel, that is, Plaintiffs’ prior improper refusal to produce  
 26 documents in the public record. *See* Dkts. 44 & 46; *see also* PPC’s Motion to Compel,  
 Dkt. 40, at 4-5 (citing *Nat.-Immunogenics Corp. v. Newport Trial Grp.*, 2017 WL  
 10573941, at \*6 (C.D. Cal. Nov. 16, 2017)).

27 <sup>8</sup> Plaintiffs also Bates-stamped certain documents with their summary judgment papers to  
 28 make it appear as though they had been produced by Plaintiffs, when, in fact, Plaintiffs  
 had not produced them. Lens Decl. ¶ 17.

1 18. Plaintiffs have no credibility to complain about PPC’s delayed production of a  
2 single document—especially given PPC’s inadvertence and Plaintiffs’ preexisting  
3 knowledge of the December 11, 2019 preview.

4 Plaintiffs nonetheless claim that inadvertence cannot justify the late  
5 production of a document, but the authorities they cite are inapposite, with their  
6 holdings tightly tethered to the specific fact patterns before the courts. Opp. at 11-  
7 12. For example, Plaintiffs rely on *RES Exhibit Servs., LLC v. LNW Gaming, Inc.*,  
8 2023 WL 6296050 (D. Nev. Sept. 27, 2023), for their broad-reaching proposition,  
9 but that case ruled narrowly on the facts before it, where the plaintiff corporation  
10 had failed to produce *any* internal communications during discovery, was unable to  
11 explain “how the Director of IT who included emails, Outlook, and TEAMS in his  
12 search, failed to produce a single email as the result of that search,” and failed to  
13 adequately remedy the issue for nearly one year after the defendant raised it. *Id.* at  
14 \*1-4. In *Rago v. Select Comfort Retail Corp.*, 2021 WL 3621890 (C.D. Cal. June  
15 11, 2021), the late-producing party had made repeated misrepresentations  
16 throughout discovery that those very documents *did not exist*, delayed production  
17 for months even after being informed by opposing counsel of missing documents,  
18 had a demonstrated pattern of failing to produce responsive documents in the  
19 litigation, and had already been cautioned by the court that she would “face more  
20 severe sanctions if she should in the future again fail to timely produce responsive  
21 documents in her possession, custody, and control.” *Id.* at \*2-4, \*7-9. And in  
22 *Voyager Indemnity Ins. Co. v. Zalman N., Inc.*, 2023 WL 2904591 (C.D. Cal. Apr.  
23 7, 2023), the existence of the late-produced document was specifically denied  
24 during discovery and the late-producing party provided no explanation of how or  
25 why the document was suddenly found during summary judgment briefing,  
26 resulting in real authenticity concerns. *Id.* at \*2-3, \*5. The instant situation comes  
27 nowhere close to these egregious fact patterns.  
28

1                    2. PPC's Delayed Production of the Preview Cut Was Harmless.

2                    Not only was PPC's delayed production substantially justified, but even if the  
3 Court were to find otherwise, it was nonetheless harmless. Plaintiffs have long  
4 known about the December 11, 2019 preview of *Maverick*—no later than PPC's  
5 second document production in April 2023, when PPC produced the film's post-  
6 production schedule—and Plaintiffs suffered no prejudice from PPC's delayed  
7 production of the Preview Cut itself. Lens Decl. ¶ 6. Any claim of “surprise” at the  
8 existence of the December 11, 2019 preview is feigned.

9                    Plaintiffs could have, but did not, seek *any* targeted discovery about the  
10 December 11, 2019 preview notwithstanding PPC's early disclosure of its  
11 occurrence, and even PPC's production of notes from the preview providing  
12 suggestions for post-production based on the audience response to it. Lens Decl. ¶¶  
13 29-30 & Exs. 4 & 5. In fact, Plaintiffs deposed *Maverick*'s director, Joseph  
14 Kosinski, about the *third* preview for the film but made the concerted decision not  
15 to ask him about the *second* preview—although they had received parallel sets of  
16 notes in discovery about both. *Id.* ¶ 31 & Ex. 3 at 74:10-75:15.<sup>9</sup> Plaintiffs also  
17 questioned Mr. Kosinski at length about the post-production schedule that  
18 confirmed the December 11, 2019 date of the second preview, but simply declined  
19 to ask him about the relevant entry. *Id.* ¶ 30 & Ex. 3 at 102:8-111:24. (Plaintiffs  
20 introduced this same post-production schedule as evidence in support of their  
21 summary judgment motion. Ex. 33 to Toberoff MSJ Decl.) Plaintiffs deliberately  
22 focused their questioning—and, later, their briefing—on *post*-termination changes  
23 to *Maverick* rather than the extensive work performed *pre*-termination, including  
24 without limitation the December 11, 2019 preview. Nor, had PPC produced the  
25 Preview Cut on the October discovery deadline instead of in November, would  
26 Plaintiffs have been able to conduct a new tranche of discovery about it.

27 \_\_\_\_\_  
28 <sup>9</sup> Other than deposing one of PPC's experts, this was the only deposition Plaintiffs took in  
this case. Lens Decl. ¶ 32.

1 The Preview Cut depicts what it depicts, so any additional discovery about it  
 2 would not have aided Plaintiffs in any event. Because the Preview Cut is what it is,  
 3 the strongest prejudice argument that Plaintiffs can muster is that they were  
 4 “deprived of the opportunity” to “test [the] alleged authenticity” of the Preview Cut  
 5 through deposition testimony. Mot. at 13. Not only would such deposition  
 6 testimony be in vain—PPC did not fabricate the Preview Cut, as its related  
 7 produced documents confirm—but the most Plaintiffs could have *conceivably* done  
 8 for their summary judgment motion is create a factual dispute on authenticity.<sup>10</sup>  
 9 And on Plaintiffs’ summary judgment motion, all factual disputes are resolved in  
 10 PPC’s favor. *Tolan v. Cotton*, 572 U.S. 650, 656 (2014).

11 Plaintiffs also cannot have been prejudiced by the delayed production of the  
 12 Preview Cut because the Court has no reason to reach the merits of the Derivative  
 13 Works Exception—the only piece of the summary judgment briefing to which the  
 14 Preview Cut is remotely relevant. As PPC explained in its summary judgment  
 15 opposition, the Derivative Works Exception is just that: an exception. Only if  
 16 Plaintiffs would otherwise prevail on their infringement claim does the Derivative  
 17 Works Exception come into play at all; no “exception” is needed without  
 18 infringement. And because Plaintiffs cannot prevail on their infringement claim—  
 19 as a general matter, but *certainly* not on summary judgment when they do not even  
 20 argue the intrinsic test—the parties’ briefing on the Derivative Works Exception  
 21 and any evidentiary issues related thereto are entirely extraneous.<sup>11</sup> See PPC’s MSJ

22 <sup>10</sup> Plaintiffs claim that the physical copy of the Preview Cut does not contain sufficient  
 23 metadata to confirm it “was even made on the date PPC alleges.” Opp. at 8. But to be  
 24 clear, the Preview Cut was *shown* at a preview on December 11, 2019—not *created* that  
 25 day (though it was necessarily created before it was shown, and therefore created well  
 26 before Plaintiffs’ January 24, 2020 termination). See Declaration of Ralph Bertelle, Dkt.  
 27 70-9, ¶¶ 10-11. The December 11, 2019 preview showing is corroborated by several other  
 28 documents, including the post-production schedule and notes from the showing. *E.g.*, Ex.  
 33 to Toberoff MSJ Decl. at TGM0010086; Exs. 4 & 5 to Lens Decl.

<sup>11</sup> The Court should also decline to reach the merits of the Derivative Works Exception for  
 the additional and independent reason that Plaintiffs failed to meet and confer about it.

1 Opp., Dkt. 70 at 20; *see also id.* at 3-20.

2 Finally, to any extent Plaintiffs can be said to face a risk of prejudice from  
 3 the delayed disclosure of the Preview Cut, that prejudice can be readily cured by a  
 4 limited reopening of liability discovery to permit Plaintiffs to conduct the  
 5 deposition they seek on authenticity of the Preview Cut. *See, e.g., Archie v. Pop*  
 6 *Warner Little Scholars, Inc.*, 2019 WL 13020480, at \*3 (C.D. Cal. Oct. 10, 2019)  
 7 (holding, after close of all discovery and notwithstanding six months of delay in  
 8 disclosures of new expert witnesses, “that permitting Plaintiffs to depose the  
 9 witnesses and conduct relevant discovery related to these witnesses will cure any  
 10 prejudice” from late disclosure and therefore denying discovery sanctions under  
 11 Rule 37); *UMG Recordings, Inc. v. Am. Home Assurance Co.*, 2006 WL 8451158,  
 12 at \*2 (C.D. Cal. Feb. 27, 2006) (denying motion to strike under Rule 37(c)(1) upon  
 13 concluding that “modifying the scheduling order cures any harm to [moving party]  
 14 by allowing it the opportunity” to conduct follow-up depositions). Such a limited  
 15 reopening of liability discovery would not require the trial date to be moved *at all*,  
 16 let alone cause a significant disruption to the case schedule.<sup>12</sup> To the contrary,  
 17 assuming any of the case remains live after the Court’s adjudication of the pending  
 18 cross-motions for summary judgment, there is already a period of time built into the  
 19 schedule for additional damages-related discovery. *See* Dkt. 67.

20 **C. The Preview Cut Is Admissible, and Plaintiffs’ Argument to the**  
 21 **Contrary Does Not Provide a Basis for Striking It Regardless.**

22 Contrary to Plaintiffs’ argument, PPC adequately authenticated the Preview  
 23 Cut. Federal Rule of Evidence 901 is satisfied by evidence “sufficient to support a  
 24 finding that the item is what the proponent claims it is.” Fed. R. Evid. 901(a).  
 25 “[T]he proponent of evidence need only make a prima facie showing of authenticity

26 \_\_\_\_\_  
 27 <sup>12</sup> Plaintiffs are particularly ill-suited to complain about any delay in the case schedule  
 28 (which would not be necessary in any event) given that they have sought and received  
 several extensions of the case schedule to date. Dkts. 35, 36, 48, 49.

1 so that a reasonable juror could find in favor of authenticity or identification.” *In re*  
 2 *Korean Ramen Antitrust Litig.*, 281 F. Supp. 3d 892, 934 (N.D. Cal. 2017) (quoting  
 3 *United States v. Workinger*, 90 F.3d 1409, 1415 (9th Cir. 1996) (internal quotation  
 4 marks omitted)).

5 Ralph Bertelle’s declaration satisfies Rule 901(b)(1). Mr. Bertelle, Executive  
 6 Vice President of Physical Production for PPC, explains in his declaration that  
 7 “[p]review versions of *Top Gun: Maverick* were prepared long before the final  
 8 movie was released,” with the “latest preview version of the movie prior to January  
 9 24, 2020 [being] shown on December 11, 2019 to a limited audience in Paramus,  
 10 New Jersey.” Dkt. 70-9 ¶¶ 1-2, 10. He further explains that PPC “maintained a  
 11 digital copy of the December 11, 2019 Preview,” and “[f]rom that master copy,”  
 12 PPC burned physical copies for purposes of this litigation. *Id.* ¶¶ 10-11. In other  
 13 words, he provides evidence “sufficient to support a finding that” the Preview Cut  
 14 “is what [PPC] claims it is.” Fed. R. Evid. 901(a).

15 Plaintiffs do not argue that those facts, if believed, are insufficient to  
 16 authenticate the Preview Cut. Nor could they. Instead, they ask the Court to ignore  
 17 the content of Mr. Bertelle’s declaration because he supposedly “has not explained  
 18 how he would have personal knowledge” of the facts set forth in his declaration.  
 19 Mot. at 9 (quoting *Silver State Intell. Techs., Inc. v. Garmin Int’l, Inc.*, 32 F. Supp.  
 20 3d 1155, 1170 (D. Nev. 2014)). Plaintiffs are wrong. Mr. Bertelle’s declaration  
 21 identifies the Preview Cut and states that his declaration is “based on [his] personal  
 22 knowledge,” including his position as a PPC executive and his “extensive behind-  
 23 the-scenes work involved in filming the movie.” Dkt. 70-9 ¶¶ 1-3. Nothing more is  
 24 required. *See In re Kaypro*, 218 F.3d 1070, 1075 (9th Cir. 2000) (holding  
 25 “[p]ersonal knowledge may be inferred from a declarant’s position” and finding  
 26 that declaration established witness’s personal knowledge where it stated that he  
 27 was credit manager “for five years before the declaration was signed” and “ha[d]  
 28 personal knowledge of the...facts”); *Desire, LLC v. Manna Textiles, Inc.*, 2017 WL



1 5635009, at \*2 n.7 (C.D. Cal. Aug. 18, 2017) (overruling authenticity objection  
 2 where corporate executive “attest[ed] that he ha[d] personal knowledge of the  
 3 matters in his declaration”); *see also* Fed. R. Evid. 602 (“Evidence to prove  
 4 personal knowledge may consist of the witness’s own testimony.”).

5 *Silver State*, the only case Plaintiffs cite in support of their “personal  
 6 knowledge” argument, is inapposite. *See* Mot. at 9. The court in that case reached  
 7 the unremarkable conclusion that a party’s attorney could not authenticate a  
 8 document pulled from “thefreelibrary.com” as a true and correct copy of a press  
 9 release issued by a non-party on April 20, 1998, because the attorney offered no  
 10 reason to believe he had any personal knowledge of the non-party’s operations. 32  
 11 F. Supp. 3d at 1170.<sup>13</sup> Here, by contrast, Mr. Bertelle is a PPC executive who was  
 12 directly involved in the production of *Maverick*. *See In re Kaypro*, 218 F.3d at  
 13 1075. Plaintiffs also insinuate that Mr. Bertelle was not sufficiently involved with  
 14 “post-production processes, such as editing,” Mot. at 10 (emphasis removed), but  
 15 quibbles like that are irrelevant: “Once the prima facie case for authenticity is met,  
 16 the probative value of the evidence is a matter for the jury.” *See In re Korean*  
 17 *Ramen Antitrust Litig.*, 281 F. Supp. 3d at 934 (overruling authenticity objection at  
 18 summary judgment). PPC adequately authenticated the Preview Cut—it is  
 19 admissible and should not be stricken from the summary judgment record.<sup>14</sup>

20  
 21 <sup>13</sup> Remarkably, Plaintiffs’ counsel seeks to authenticate documents proffered in support of  
 Plaintiffs’ motion for summary judgment. *See generally* Toberoff MSJ Decl.

22 <sup>14</sup> Although Mr. Bertelle’s declaration is based on his own personal knowledge and  
 23 therefore satisfies Rule 901(b)(1), PPC notes that “district courts in this circuit have  
 24 routinely overruled authentication and hearsay challenges at the summary stage where the  
 evidence could be presented in an admissible form at trial, following *Fraser*.” *Hodges v.*  
 25 *Hertz Corp.*, 351 F. Supp. 3d 1227, 1232 (N.D. Cal. 2018) (referencing *Fraser v.*  
 26 *Goodale*, 342 F.3d 1032, 1036-37 (9th Cir. 2003)); *Chinitz v. Intero Real Est. Servs.*, 2021  
 27 WL 1375837, at \*3 (N.D. Cal. Apr. 12, 2021) (“[T]he Court OVERRULES Defendant’s  
 28 evidentiary objections on the basis that the evidence could be presented in an admissible  
 form at trial.”); *accord Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542,  
 1551 (9th Cir. 1989) (consideration of unauthenticated document on summary judgment is

**D. The Relief Plaintiffs Seek Is Overbroad.**

Even if the Court found merit to Plaintiffs’ motion, the relief they seek is vastly overreaching, seeking far more than striking the Preview Cut. *First*, there is no reason to strike the Preview Cut from the summary judgment record—irrespective of the Rule 37 analysis—because the Court should not pass on the merits of the Derivative Works Exception at all and therefore need not consider any of the evidence proffered for or against it. That is because the Derivative Works Exception comes into play only if Plaintiffs prove the works are substantially similar as a matter of law under both the intrinsic and extrinsic tests, which Plaintiffs cannot (and do not even purport to) do. *See* PPC’s MSJ Opp., Dkt. 70 at 20; *see also id.* at 3-20. In other words, Plaintiffs could not obtain summary judgment on their copyright infringement claim and tagalong declaratory relief claim without (1) prevailing on the extrinsic test for infringement (which they fail), (2) prevailing on the intrinsic test for infringement (which they do not even attempt), and *then* (3) also overcoming the Derivative Works Exception, which, if applicable, would render even a substantially similar work non-infringing. Plaintiffs did not move for *partial* summary judgment, which in any event would be inefficient here given the overlapping proof for the various subsets of the infringement analysis.

*Second*, if any relief is warranted for PPC’s delayed production, it is the limited reopening of liability discovery for a Rule 30(b)(6) deposition enabling Plaintiffs to probe the authenticity of the Preview Cut—and even then, only in the event that the Court does not grant PPC summary judgment on infringement (which would moot any issues concerning the Derivative Works Exception and, in turn, the Preview Cut). Indeed, discovery is still *ongoing* in this case due to the bifurcation

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harmless where a “competent witness with personal knowledge could authenticate the document” at trial). Were there any doubt as to Mr. Bertelle’s ability to authenticate the Preview Cut, PPC could proffer a different witness at trial, and thus the Court could overrule Plaintiffs’ objection for this additional reason.



1 of liability and damages discovery, with damages discovery open through May 6,  
 2 2024, Dkt. 67, so the case progression would not be disrupted by this relief. In  
 3 sum, such a deposition would not delay trial, would eliminate any conceivable  
 4 claim of prejudice at trial (when, unlike on Plaintiffs' summary judgment motion,  
 5 all factual disputes would not automatically be viewed in PPC's favor), and would  
 6 facilitate a ruling on the merits.

7 *Third*, even if the Court were to exclude the Preview Cut—and it should  
 8 not—that provides no justification for striking the much broader passages of PPC's  
 9 summary judgment opposition brief, its statement of additional facts, or the Bertelle  
 10 Declaration listed in Plaintiffs' Notice of Motion. To be clear, *not one sentence* of  
 11 PPC's opposition brief hinges on the Preview Cut. Most egregiously, Plaintiffs ask  
 12 this Court to strike several lines of the opposition brief that do not even indirectly  
 13 cite to the Preview Cut.<sup>15</sup> At most, the Preview Cut lends *cumulative* evidentiary  
 14 support to certain statements in PPC's opposition brief, which survive even if the  
 15 Preview Cut is stricken. Plaintiffs play a similar game with PPC's additional facts.  
 16 Again, they ask the Court to strike facts that do not rely on the Preview Cut itself,  
 17 or that use the Preview Cut as *cumulative* support for the proposition. And they  
 18 inexplicably seek to strike paragraphs of Ralph Bertelle's Declaration, beyond the  
 19 Preview Cut exhibit, that simply *relate* to the Preview Cut. But the existence of the  
 20 December 11, 2019 preview was indisputably disclosed in discovery, so there is no  
 21 arguable basis for such broad-based exclusion. If the Court were to exclude the  
 22 Preview Cut, it is amply capable of deciding for itself what propositions remain  
 23 supported by the evidence—just as it would for any other factual determination on  
 24 summary judgment.

#### 25 **IV. CONCLUSION**

26 The Court should deny Plaintiffs' Motion to Strike.

27 <sup>15</sup> See Mot. at ii (asking the Court to strike, *inter alia*, lines 22:20-23 of PPC's summary  
 28 judgment opposition).

1 Dated: December 18, 2023

O'MELVENY & MYERS LLP

2 By: /s/ Molly M. Lens  
3 Molly M. Lens

4 *Attorneys for Defendant*  
5 *Paramount Pictures Corporation*  
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**CERTIFICATE OF COMPLIANCE**

The undersigned, counsel of record for Defendant Paramount Pictures Corporation, certifies that this brief contains 7,000 words, which complies with the word limit of L.R. 11-6.1.

Dated: December 18, 2023

**O'MELVENY & MYERS LLP**

By: /s/ Molly M. Lens  
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